BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:October 28, 1997
Case Nos: 96-INA-0191

In the Matter of:

ALEXIS MUSIC
Employer

On Behalf of:

SAMINA RAHMAN
Alien

Appearance: Rafael A. Rose, Esq.
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Rafael A. Rose ("Alien") filed by Employer Alexis Music. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Fransisco, California denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment

service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On March 6, 1995, the Employer filed an application for labor certification to enable the Alien to fill the position of Music Talent Marketing (Asiatic Performers) Consultant in its Music Publisher and Producer company.

The duties of the job offered were described as follows:

"Will locate new Ethnic Asiatic music and performers including Bangladeshi artists and music to be promoted and used in the recording, film, video business. Will negotiate with publishers, producers, and musicians. Will conduct market surveys to utilize trends in international music to maximize marketing of new music and artists. Will determine which music is viable for commercial marketing based on trends and artistic level of excellence. Will arrange all facets of copy right, taxes and customs with relevant parties, using professional advice when necessary in these areas. Will liase with media regarding Asiatic and Bangladeshi Music, to insure profitability of venture."

A college Bachelor's degree in business administration or marketing was required, and two years experience. Related occupation was performing Bangladeshi Music or Central Asian. Special requirements were: Must have background in Bangladeshi and central Asiatic Music including ability to arrange ethnic Bangladeshi music into marketable forms to specific Consumer groups. Must be able to determine which music and acts are potentially profitable by experience in this art form. Supervises 0 employees and reports to the Owner. Wages were $30,000 per year. (AF-25-97)

On April 18,1995, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(2)(I)(A) in that several requirements are unduly restrictive. These include: (1) Background in Bangladeshi and Central Asiatic music;(2) Ability to arrange ethnic Bangladeshi music into marketable forms; (3) Two years related experience in performing Bangladeshi or Central Asian music; (4) Combination of duties. Rebuttal could be accomplished by deletion of the requirements, or documentation of: actual musical arrangements of Bangladeshi music; "Explain how background in Bangladeshi differs or is the same from two years experience; if it is the same, why has the term "background" been used instead of experience?"; how U.S. workers could gain experience in this area. Secondly, Employer may have violated 20 CFR 656.21(b)(2)(ii) by requiring a

combination of duties rather than one position listed in the Dictionary of Occupational Studies. Alleged violation of combination of duties was: (1) Market research analyst; (2) Business manager; (3) Music arranger; (4) Copyright expert; (5) Performing ability; (6) Music Consultant. Employer could either eliminate the unnecessary duties, modify the requirements, or document that such employment is normal and customary. (AF-17-23).

Employer, May 21, 1995, forwarded its rebuttal, stating that education and training were available in the U.S., and attached samples of Western and Mid-eastern music. In answer to the CO's background query, Employer stated:"The term "background" as opposed to "experience" is a broader, more inclusive term that is a prerequisite for enabling one to exercise judgment of the quality of the performance to be marketed from a position of critical knowledge for assessment, and without the background, which may be established by study, performance or actual work experience, and can be viewed as be included in the work experience or in the alternative, performance of ethnic music, the proper evaluation cannot be made. Thus the background is really part of the experience requirement listed in the job requirements, and clarifies the nature and reason for the experience required."

With respect to the combination of duties, Employer stated:"..analysis of trends is required in conjunction with the knowledge and critical appreciation of the music performed, but the copyright expertise will be obtained from other experts and applied as necessary. Performing skill per se has not been required, but is only one way of having a general background. The music consultant, arranger, and manager function have been explained not to be understood as separate components but rather to be envisioned by the worker in the assessment of the music and talent and in its application to potential marketing for financial profit. The subject matter of the analysis must be understood in a context and not in a vacuum, and therefore these components enter into the analysis and assessment function, and are not meant to be individual functions. They are only necessary for the worker to oversee the entire picture so as to make a proper analysis and evaluation." The Employer went on to state that ".. the business is a relatively small operation, and the duties listed, as explained above, are a normal scope of employment for such a position." (AF-11-16)

On June 12, 1995, the CO issued a Final Determination denying certification. The CO contended that comparing "background" with experience is not acceptable since the only validated experience alien had with respect to the extended job requirements was as a performer. Secondly, Employer did not demonstrate that the combination of duties is necessary to the job. "An employer cannot lawfully justify job requirements based on some future projection or "potential for maximization of profit." Finally, the CO contends there was no opportunity for a

U.S. worker to gain knowledge and experience in Bangladeshi and Central Asian music. (AF-7-10)

On July 11, 1995, Employer filed a request for review of the Final Determination. (AF-97-112)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.25(e) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited in that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity, Venture International Associates, Ltd.87-INA-569(1989)(en banc).

The record indicates that Employer is a music store which would prefer to hire alien who has performed as a musician specializing in Bangladesh music. Alien, having worked as an employee of a large corporation, Marriott, in accounting for a short period of time, has an interesting background combination of musical aptitude and business studies with high grades.

Employer, however, has not demonstrated how the combination of duties suggested is needed in its business, and why the requirements are not unduly restrictive. Indeed, after advertising the various requirements of musical background with a number of combination of duties covering a wide area, usually not possessed by one individual, Employer in its rebuttal indicates that all these qualities are not necessarily needed, but that some, such as copy right expertise, can be obtained from other sources. Thus Employer has failed to show that reasonable alternatives such as part-time workers, new equipment and business reorganization are infeasible. Robert L. Lippert Theaters, 88-INA-433 (May 30, 1990)(*en banc*)

Further, as determined by the CO, Employer has required 2 years experience in the field, but has not demonstrated how past experience in musical performances can be equated to the extensive requirements in the job description which are related to marketing in one form or another. Nor has employer established that the combination of duties is customary in the business or that he formally employed someone with the same duties. CPI Machinery, Inc., 88-INA-176 (Aug. 7, 1989). It is emphasized that Employer has advertised for U.S. workers with these combinations of duties.

Since our decision is based on these grounds, it is unnecessary to determine whether or not the requirement of proficiency in Bangladesh music specifically, is an unduly restrictive requirement.

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

_____
JOHN C. HOLMES
Administrative Law Judge

Judge Holmes, dissenting.

I respectfully dissent. In order to show a business necessity Employer must show that the requirement bears a reasonable relationship to the occupation in the context of the employer's business and that the requirement is essential to performing in a reasonable manner the job duties as described by the Employer. Information Industries, Inc., 88-INA-82(Feb.9, 1989)(en banc). I believe Employer has met that standard. I'm impressed by the fact that Employer in describing the 50 mile "commute" is merely describing what takes place in his business. While Employer's mere statement that this is a usual practice in the industry need not be taken at full value, nevertheless, alien's job with Employer does in fact cause him to make such commute. I assume that Employer uses good business methods and would not require an unnecessary loss of time in travel were it not essential for the business. Moreover, it makes sense to locate a warehouse in less expensive New Jersey, with the retail outlet in congested, shopping mecca in New York City. Employer has gone to great lengths to explain his business and to provide the necessary information to the CO on this issue. The requirement was not tailored to meet any specific experience of alien or to set up a discouragement for U.S. workers. The documentation requirement of an hour by hour breakdown of the job duties is not a basis for denial of certification since, in light of Employer's explanations, the job varies from day to day, but requires substantial commuting. I believe the Employer has met the test of obtaining reasonable documentation set out in Gencorp., 87-INA-659(January 13, 1988)(en banc).

Similarly, the CO's basis for denial based on failing to offer the job on the same conditions that it was offered to the alien is not persuasive. As set out at length by Employer, alien's past experience was similar to his current job with Employer. I quote

at length from Employer's rebuttal (AF-90):"It is our position that a minimum of two years experience is an absolute business necessity for this job. The reason for this is that without such experience one simply does not possess the knowledge and coordination of inventory/shipping/receiving systems. In the instant case we did not train Mr. Torres as he worked for some two years as a supervisor at Just Packaging during which he performed the same sort of supervision skills in the direction and processing of inventory (products brought in for shipment), shipping (carrier selection, records, follow up) and receiving (intake of items to be shipped with necessary records and inventory input/stocking). Our business is more commercial but nevertheless involves that same functions as the majority of our shipping is in fulfillment of our catalog orders to individual customers and the receiving/inventory is larger and more involved in terms of coordination and control but does not utilize the same skills that Mr. Torres acquired at Just Packaging. In fact the experience at a facility like Just Packaging is actually very good as such operations survive on the ability to turn around a product receipt, short term inventory and shipment coordination on a rapid high volume basis. Mr. Torres was not a packer at Just Packaging but did supervise some 15 people in this receiving/inventory/shipping function. These skills are a "commodity" of sorts and are transferable to a wide variety of merchandise. At Just Packaging Mr. Torres dealt with whatever product was being processed. In our business we deal with ready to wear, although the skills are the same and it is not necessary to be limited to backroom operation of clothing or luggage. Should you feel that the ETA7-50A should be modified at item 14 for related experience we shall be happy to do such; although do not see the distinction in job skills."

I have quoted at length to indicate the apparent good faith and knowledge of the business by Employer, as well as the fact that alien had had prior experience in the job opportunity, albeit in a different industry. I might have preferred that the CO had taken up Employer's offer to readvertise, and perhaps on a wider basis, including a New York newspaper. However, while the CO had earlier contended the New York Times should also be used for advertising, she had not given failure to do so as a reason for proposed denial in the NOF. Employer thus was not given an opportunity to rebut or remedy the issue through advertising

Finally, I agree that Employer did not document the annual volume of business as directed because "principals do not permit such disclosure." Even in today's litigious society, a stronger basis should have been given by Employer for refusing to make such information available were it necessary to the determination of this matter. Employer, however, has documented the number of employees in the company their location and the nature of most of their duties. The additional information requested for documentation and refused is of little, if any, value in the determination of the issues raised by the CO, and its revelation would be irrelevant to this determination. The CO has not given a

valid reason why such requested documentation was necessary.

As stated *supra* while I could have preferred a better testing of the U.S. market and remain unconvinced that there are not U.S. Stock Supervisors available and willing to work for the wages offered in the New York City area, the CO has not given valid reasons for denial of certification. Stated differently, Employer has made a good faith effort to test the U.S. job market and has responded satisfactorily in documenting the matters requested by the CO concerning the issues on which certification was denied. I would remand for granting of certification.

_____
JOHN C. HOLMES
Administrative Law Judge